

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES A. BAILEY and DEPARTMENT OF VETERANS AFFAIRS,
CENTRAL ALABAMA VETERANS HEALTH CARE SYSTEM, Montgomery, AL

*Docket No. 02-391; Submitted on the Record;
Issued June 13, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 3, 2001 on the grounds that he refused suitable work pursuant to 5 U.S.C. § 8106(c); and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On May 29, 2001 appellant, then a 60-year-old locksmith, filed a traumatic injury claim alleging that on May 25, 2001 he hurt his right shoulder and back when he hit his left knee on a lawn mower wheel guide and fell to the concrete on his right shoulder and back. Appellant stopped work on May 25, 2001.

By letter dated July 13, 2001, the Office accepted appellant's claim for a right scapular fracture.

In a July 17, 2001 letter, the Office requested that Dr. Michael Freeman, a Board-certified orthopedic surgeon and appellant's treating physician, provide information regarding appellant's employment injury including whether appellant could return to light-duty work. In an August 8, 2001 attending physician's report, Dr. Freeman indicated that appellant could return to light-duty work as of July 31, 2001.¹ In a duty status report of the same date, Dr. Freeman provided appellant's physical restrictions.

By letter dated August 20, 2001, the employing establishment offered appellant the modified position of locksmith. In an August 23, 2001 letter, the Office determined that the job was suitable and advised appellant that he had 30 days to either accept the position or to provide justification for refusing the job offer or else he risked termination of his compensation benefits. On September 3, 2001 appellant rejected the employing establishment's job offer due to his physical condition and limitations.

¹ The record reveals that appellant retired from the employing establishment effective July 31, 2001.

On September 24, 2001 the employing establishment advised the Office that the job was still available. In a letter of the same date, the Office notified appellant that his reasons for refusing the offer of suitable work were unacceptable. Appellant was given an additional 15 days to accept the job offer or else his compensation would be terminated.

The Office contacted the employing establishment on October 29, 2001 and confirmed that the offered position was still available.

By decision dated October 31, 2001, the Office terminated appellant's compensation effective November 3, 2001 on the grounds that he refused an offer of suitable work.

In an undated letter received by the Office on November 13, 2001, appellant requested reconsideration of the Office's decision accompanied by factual and medical evidence.

By decision dated November 28, 2001, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was cumulative, speculative, repetitious, and/or immaterial, and thus, insufficient to warrant a review of its prior decision.

The Board finds that the Office improperly terminated appellant's compensation effective November 3, 2001 on the grounds that he refused suitable work pursuant to 5 U.S.C. § 8106(c).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² This includes cases in which the Office terminates compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee under section 8106(c)(2).³ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.⁴ The issue whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁵

Section 10.124(e)⁶ of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁷ To justify termination, the Office must show that the work offered

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

⁴ *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁵ *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁶ 20 C.F.R. § 10.124(e).

⁷ *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

was suitable,⁸ and must inform appellant of the consequences of refusal to accept such employment.⁹ According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.¹⁰

The Board has stated that the weight of the medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.¹¹

In terminating appellant's compensation, the Office relied on the August 8, 2001 reports of Dr. Freeman. In his August 8, 2001 attending physician's report, Dr. Freeman diagnosed a right scapular fracture caused by appellant's accepted employment injury. He indicated that appellant was able to resume light-duty work as of July 31, 2001. In a duty status report of the same date, Dr. Freeman provided that appellant could not lift/carry 0 to 100 pounds, stand, walk, climb stairs and ladders, kneel, bend, stoop, twist, pull/push, perform simple grasping and fine manipulation, reach above his shoulder, and endure exposure excess humidity, chemicals, solvents, fumes, dust and noise. Dr. Freeman further provided that appellant could sit for eight hours a day.

The physical requirements of the offered modified locksmith position included lifting, carrying from 5 to 50 pounds, standing, reaching above the shoulders, fine manipulation, walking stairs and ladders, bending, twisting, reaching, kneeling, squatting and climbing up to 4 hours a day. The job also required sitting up to eight hours a day.

The physical requirements of the offered position of modified locksmith exceed the physical restrictions set forth by Dr. Freeman. The Board finds that the Office improperly invoked the penalty provision of section 8106(c) in this case.¹²

⁸ See *Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁹ See *Maggie L. Moore*, *supra* note 7; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

¹¹ *Melvina Jackson*, 38 ECAB 43 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

¹² In view of the Board's decision on the issue whether the Office properly terminated appellant's compensation because appellant refused suitable work, the issue regarding the denial of appellant's request for a merit review of his claim is moot.

The October 31, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 13, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member